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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,
Respondents.

PETITION OF GULF STATES UTILITIES COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION OF GULF STATES UTILITIES COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Gulf States Utilities Company ("Gulf States"), prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, decided October 12, 1971, petitioner's Motion for Rehearing overruled December 15, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, is

App. A, *infra*, at p. 1a. Judgment of the Court of Appeals is App. B, *infra*, at p. 30a. Order overruling petition for rehearing is App. C, *infra*, at p. 31a. The order of the Federal Power Commission ("FPC") authorizing Gulf States to issue $30,000,000 principal amount of First Mortgage Bonds is App. D, *infra*, at p. 32a; supplemental order approving price and interest rate is App. E, *infra*, at p. 38a; and FPC order overruling motion for rehearing filed by Cities of Lafayette and Plaquemine, Louisiana ("Cities"), Intervenors in the proceeding before the FPC, is App. F, *infra*, at p. 41a.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit was entered October 12, 1971. Petition for rehearing was denied on December 15, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the FPC has a duty to investigate charges of Sherman Act violations under §204 of the Federal Power Act.

2. Whether the FPC and the SEC have different duties for investigation of alleged Sherman Act violations in proceedings under §204 of the Federal Power Act and under §6 (a) and §7 (d) (6) of the Public Utility Holding Company Act, respectively.

3. Whether the Court of Appeals can require the FPC to investigate antitrust allegations found to be irrelevant by the FPC.

STATUTES INVOLVED

Sections 201, 202, subsections (a) and (b), 203, 204, 205, 206, 305, 306, 307, and 313 of the Federal Power Act, 16 U.S.C. §824, §824a, subsections (a) and (b), §824b, §824c, §824d, §824e, §825d, §825e, §825f, and §825 1, and §11, subsections (a) and (b) of the Clayton Act 15 U.S.C. §21, subsections (a) and (b), are set forth in Appendix G, *infra*, pp. 43a-59a.

STATEMENT

Section 204 of the Federal Power Act (App. G, *infra*, 47a-49a) provides that no public utility shall issue any security until, upon application by the public utility, the FPC by order authorizes such issue. It also provides the FPC shall make such order only if it finds among other things that such issue is for some lawful object and compatible with the public interest.

On October 12, 1970, Gulf States, a public utility, filed with the FPC an application for an order authorizing it to issue and sell bonds at competitive bidding (R. pp. 1-12, incl.).[1] The application stated that the proceeds from the sale of the bonds would be used to pay off part of the Company's short-term indebtedness. Cities filed a verified protest which, with appendices, consisted of 106 pages (R. pp. 54-160, incl.) charging Gulf States with engaging in frivolous and repetitive litigation and mounting a public relations drive and lobbying effort in concert with two other utility companies over a period of years "apparently" violative of the antitrust laws, among others, to Cities' damage. Gulf States answered (R. p. 263) pointing out that the bond proceeds would be used merely to refund short-term secur-

[1] "R" refers to the printed appendix filed in the Court of Appeals in connection with the appeal which resulted in the judgment (App. B, *infra*, p. 30a) which Gulf States asks this court to review.

ities theretofore authorized by an uncontested FPC order and urging the irrelevancy of intervenors' contentions on that and other grounds.

The FPC permitted Cities' intervention but without a hearing overruled the same and granted Gulf States' authorization for issuance of the bonds (App. D, *infra*, at p. 32a). Cities' petition for rehearing was overuled by the FPC (App. F, *infra*, at p. 41a). Cities filed Petitions for Review of Orders of the FPC in the U. S. Court of Appeals for the District of Columbia Circuit, where it was docketed as Cause No. 71-1041 and consolidated, for purposes of argument, with Causes Nos. 24,764 and 24,963 wherein Cities were petitioners, Securities and Exchange Commission ("SEC") was respondent and Louisiana Power & Light Company was intervenor. The Court disposed of all three numbered causes in a single opinion (App. A, *infra*, p. 1a). Facts and contentions of the parties are more extensively set forth in the opinion of the Court of Appeals below (App. A, *infra*, p. 1a).[2]

REASONS FOR GRANTING THE WRIT

The Court of Appeals has imposed an additional duty upon the FPC to investigate alleged Sherman Act violations and has relieved the SEC of such duty under comparable circumstances, all in face of determinations by both commissions that the activities alleged to be anticompetitive in both proceedings were irrelevant to the purposes of the respective proceedings. In so doing, such Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court, and, the Court of Appeals in attempting to reconcile its own prior deci-

[2] The Court's statement (App. A, *infra*, p. 10a) of Cities' argument in petition for rehearing before the FPC is erroneous but not thought to be material to consideration of this petition.

ions,[3] has left the only court interpretations in this vital area of law in a confused and inconsistent state.

The FPC neither filed motion for rehearing with the Court of Appeals below nor petitioned this Court for *certiorari*. This should not reflect on the importance of the issue. The FPC may have been stung by the implication of counsel for the Cities that the FPC's position was that of "an ingenious Commission which wishes to avoid regulatory problems by narrowing its own jurisdiction."[4]

1. The importance of granting this petition is documented by clear evidence that if this case is not reviewed the FPC and public utilities subject to its jurisdiction will labor under a court ordered construction of §204 of the Federal Power Act arrived at without objective consideration because of a mistaken belief that it was compelled by an inapposite opinion of the Supreme Court. The Court below selected the opinion of the Supreme Court in *Denver & Rio Grande Western R. Co. v. United States*[5] as the pattern for its opinion and judgment. If that opinion does not support the Court of Appeals, then it has no support. The Court of Appeals noted that §204 of the Federal Power Act is almost identical with certain provisions of §20a of the Interstate Commerce Act which were interpreted in the Supreme Court's opinion in *Denver & Rio Grande* and treated that opinion as controlling here.

The Court of Appeals failed to note that the Supreme Court in its opinion in *Denver and Rio Grande* written by Justice Brennan warns:

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[3] *Alabama Electric Cooperative v. SEC*, 122 U.S. App. D.C. 367, 353 F.2d 905 (1965); *Municipal Electric Ass'n of Massachusetts v. SEC*, 134 U.S. App. D.C. 145, 413 F.2d 1052 (1969); *Municipal Elec. Ass'n of Mass. v. SEC*, 136 U.S. App. D.C. 175, 419 F.2d 757 (1969); *City of Pittsburgh v. FPC*, 99 U.S. App. D.C. 113, 237 F.2d 741 (1956); *Northern Natural Gas Co. v. FPC*, 130 U.S. App. D.C. 220, 399 F.2d 953 (1968). All of these cases are mentioned in the opinion of the Court below (App.A, *infra*, p. 1a.).

[4] Brief for Petitioner Cities in Court of Appeals below, p. 20.

[5] 387 U.S. 485 (1967)

> *Section 20a, like § 5, must after all be read in the context of overall ICC responsibilities. The responsibility under § 11 of the Clayton Act to enforce that Act's provisions is one of them.*[6] (Emphasis supplied.)

Further in the same opinion, it is said:

> . . . *the Clayton Act* is prohibitive, and *imposes a positive obligation upon the ICC to act. The Commission is directed, whenever it has reason to believe any carrier within its jurisdiction is violating § 7, to "issue and serve* upon such person . . . *a complaint* stating its charges . . . *and containing a notice of a hearing.*" 15 U.S.C. § 21(b), Section 16, 15 U.S.C. § 26, excepts from the power of private persons to bring § 7 suits for injunctive relief all cases involving matters subject to ICC jurisdiction. By thus limiting the authority of private persons to institute court proceedings to enjoin § 7 violations, *this provision underscores the ICC's responsibility to act when such violations are brought to its attention.*[7] (Emphasis supplied.)

The Court of Appeals erred in tracking the language just quoted to reach its own decision in the instant case. In *Denver and Rio Grande*, the Court was reviewing an application to the ICC for authority to issue securities to another carrier in which it was either conceded or assumed *arguendo* by all parties that "anticompetitive" effects were involved.[8] The Court said that the ICC need not grant a hearing in every case, but that when the ICC exercises its discretion to approve issuances without first considering important competition issues, the reviewing court must closely scrutinize its action in light of the ICC's *statutory obligations* to protect the public interest and *to enforce the antitrust laws.*[9]

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[6] 387 U.S. 485, 493 (1967)

[7] 387 U.S. 485, 502

[8] At page 491

[9] 387 U.S. 485, 498. This statement is included by the Court below in a quotation (App. A, *infra*, p. 15a) used to support its insistence on close scrutiny by the reviewing court of omission of a hearing on anticompetitive issues apparently without the Court noticing that the FPC does not have the same statutory obligation as the ICC.

Having noted [10] the ICC's responsibility under §11 of the Clayton Act, the Court concludes its opinion[11] with the statement:

> The Government was correct in its position before the ICC that this record placed "before the Commission *serious questions under section 7 of the Clayton Act," requiring a hearing.* (Emphasis supplied.)

The FPC (like the SEC) *is not among the governmental agencies authorized by §11(a) to enforce §7 of the Clayton Act.* Sections 11(a) and (b) of the Clayton Act (App. G, *infra*, p. 57a) confirm what the Supreme Court has elsewhere remarked that *"Other administrative agencies are authorized to enforce §7 of the Clayton Act when it comes to certain classes of companies or persons; but the Federal Power Commission is not included in the list."*[12] (Emphasis supplied.) Thus, *Denver and Rio Grande* would not have been apt authority in the instant case even if Gulf States had been accused of Clayton Act violation. But Cities have invited the FPC's attention to an "apparent" violation of the Sherman Act. The Court below has said previously in *City of Pittsburg* v. *Federal Power Commission* that "... the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality...."[13] If the FPC in the remanded proceedings should enter an order placing restrictions on the use of the proceeds of future securities issues (the proceeds of the Bonds have long since been used for the purpose specified in the FPC's order), would this not be doing by indirection what the same Court has said can not be done directly? Would this not be in effect a prospective judgment of illegal pur-

[10] 387 U.S. 485, 501
[11] At page 507.
[12] *California v. Federal Power Commission*, 369 U.S. 482, 486.
[13] 237 F.2d 741, 754.

pose and in effect an injunction against anticipated operations or activities the FPC judged might be illegal?[14]

The Supreme Court in *Denver & Rio Grande* declared another reason for reading anticompetitive issues into the public interest standards of §20a of the Interstate Commerce Act. Justice Brennan, speaking for the Court, said:

> The responsibility to advance the National Transportation Policy, read into the "public interest" standard of §5, is another persistent and overriding duty, equally applicable to §20a.[15]

The National Transportation Policy [16] provides for regulation to accomplish various things:

> *without unjust discriminations, undue preferences, or advantages, as unfair or destructive competitive practices.* (Emphasis supplied.)

The declaration of policy contained in §201 of the Federal Power Act (App. G, *infra* p. 43a) contains nothing similar and nothing concerning competitive practices.

What the opinion in *Denver and Rio Grande* makes crystal clear is that the ICC must read into the "public interest" test of §20a of the Interstate Commerce Act anticompetitive responsibilities imposed upon it by the Clayton Act and

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[14] The bonds were sold when authorized by FPC supplemental order issued December 9, 1970, almost a year before the Court of Appeals remanded the cause for FPC attention to anticompetitive issues. Thus, the FPC was not directed to reconsider whether or not the bonds should be authorized but to consider whether or not evidence of unlawful anticompetitive activity should be investigated and, presumably, if evidence of continuing antitrust violations was discovered, to take appropriate action. What such action should be is not easy to envision. One possible action would be to report possible violation to the Attorney General. However, §314(a) of the Federal Power Act does not make it the duty of the FPC to report antitrust violations to the Attorney General as does §20a of the Natural Gas Act.

[15] 387 U.S. 485, 493. See also *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944).

[16] 54 Stat. 899, 49 U.S.C.A. (note preceding §1.)

the National Transportation Policy. By failing to recognize those factors, as it must in fairly judging FPC responsibility under §204 of the Federal Power Act, and in relying on a similarity of language between §204 and parts of §20a, the Court below fell into the error of tracking in our case the directions of the Supreme Court to the ICC in *Denver and Rio Grande.*

Had the Court of Appeals not felt shackled by *Denver,* it might have followed the declared practice of the Supreme Court and shown deference to the interpretation given the statute by the agency charged with its administration[17] by following the FPC's construction of §204 in *Pacific Power & Light Co.,* 27 F.P.C. 623 (1962) noticed by the Court below at App. A, *infra,* pp. 16a-17a. The FPC there held the purpose of §204 is to prevent issuance of securities which might impair financial security or ability to perform public utility responsibilities.

A subsidiary question, if the FPC is assumed to have some Sherman Act responsibility under §204 of the Federal Power Act and if it is assumed that the proceeds of the securities to be issued might be used in furtherance of Sherman Act violations, is whether it has a duty to consider alleged Sherman Act violations not claimed to arise from or be related to operations or activities subject to FPC regulation. In the instant case, Cities alleged Gulf States instigated a series of lawsuits over a period of five years which delayed the use of funds by a public electric authority not a party to this litigation, engaged in frivolous and repetitive litigation and mounted a public relations drive and lobby effort against such public authority. These are activities over which the Federal Power Act gives the

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[17] *Udall* v. *Tallman,* 380 U.S. 1 (1965).

FPC no regulatory responsibility.[18] If Gulf States deemed it in its best interest to endeavor to protect its business and retain its customers against the activities of competitors by filing lawsuits or engaging in public relations drives, the Federal Power Act did not require it to first obtain authorization from the FPC.[19]

2. While the structure of §204 of the Federal Power Act differs from that of §6 (15 USC, §79f) and §7 (15 USC, §79g) of the Public Utility Holding Company Act (49 Stat. 838, as amended, 15 USC §79, *et seq.*), there is no support in either logic or policy for giving them different interpretations in the respects under consideration.

3. The Court of Appeals below has decided a federal question in a way which is in conflict with applicable decisions of the Supreme Court in that it has set aside a find-

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[18] Although the Court below discussed (App. A, *infra*, pp. 18a, 27a), some of the following sections, the Court referred to no allegations of violations by Gulf States or requests for relief by Cities, and there were none, within the scope of §202 in subsections (a) and (b) (App. G, *infra*, pp. 44a-45a) relating to interconnections, §203 (App. G, *infra*, p. 46a) to merger, consolidation and acquisitions of another public utility, §205 and §206 (App. G, *infra*, pp. 49a-52a) to rates, and §305 (App. G, *infra*, p. 52a) to interlocking directorates. Had charges been made of violations under those sections, §306 (App. G, *infra*, p. 53a) provides for complaints and §307 (App. G, *infra*, p. 54a) for investigations by the FPC of violations of the chapter.

[19] The Supreme Court has held that publicity campaigns and litigation directed toward obtaining governmental action adverse to prospective competitors is not illegal merely because affected by an anticompetitive purpose nor is it illegal for one to seek action on laws in hope of achieving an advantage for himself and a disadvantage to competitors. *Eastern Railroad's President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The rule was recently reaffirmed in *California Motor Transport Co., et al.* v. *Trucking Unlimited*, 92 S.Ct. 609 (decided January 13, 1972). This line of authority only serves to increase the difficulty of the FPC in determining the direction and scope of actions or orders which might be appropriate if investigation of antitrust activity should be undertaken upon remand of this cause.

ing of the FPC supported by substantial evidence.[20] If the FPC has a duty to consider alleged Sherman Act violations, surely it can be assumed that such duty does not arise in a §204 proceeding if the proposed use of the proceeds of the securities issue do not relate to furtherance of any such violations. In effect, this is what the FPC found in this case. In its order the FPC found:

> (6) the matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission. (App. C, *infra*, at p. 36a.)

Preliminary to this specific finding the FPC addressed itself to the refunding purpose of the bond issue in the body of its order, App. C, at pp. 34a and 35a, the latter part of which was quoted in the opinion of the court below at App. A, p. 10a. Gulf States declared the purpose for which its bonds were to be issued in its verified Application to the FPC (R.,

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[20] Federal Power Act, §313(b), App. G. p. 54a, 55a; *Gainesville Utilities Dept.* v. *Florida Power Corp.*, 402 U.S. 515 (May 24, 1971); *Federal Power Commission* v. *Florida Power & Light Co.*, 92 S.Ct. 637 (January 12, 1972). Even if the quoted finding be treated as dealing with more than a "pure" fact question, it is a finding based on substantial evidence within an area of discretion assigned to FPC for the exercise of its expertise and should not be disturbed by the Court. *Securities and Exchange Commission* v. *New England Electric System*, 390 U.S. 207 (1968); *United States* v. *Drum*, 368 U.S. 370 (1962); *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944); *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U.S. 96, 127 (1949). That there is no dispute concerning the evidentiary facts does not permit Court to substitute its judgment for that of the agency. *Gray* v. *Powell*, 314 U.S. 402, 412 (1941). On undisputed facts, the Court is free to disturb the Commission's finding only if it lacks any rational or statutory foundation. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947). A reviewing court cannot set aside an inference because it believes an opposite inference to be more reasonable. If supported by evidence and not inconsistent with law, the agency's finding is conclusive. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 477-8 (1947).

p. 5).[21] Despite this clear evidence of a deliberated finding by the FPC, the Court below said:

> It suffices for present purposes to say that the FPC's terse and cryptic statement did not comply with the requirement we see in *Denver & Rio Grande*, that the agency's reason for denying or deferring hearing of anticompetitive issues be clear on the record, meaningful in findings or discussion. (App. A, *infra*, pp. 21a, 22a).

In summary, if permitted to stand, the opinion of the court below will add to the number of governmental agencies with the responsibility or authority to investigate antitrust law violations or anticompetitive activities and impose upon the FPC and public utilities hereafter seeking its authority for the financing of construction of electric systems (for which the Federal Power Act provides no certificating requirements), the burden, delay, and expense of investigation and examination of matters which are beyond the scope of the FPC's lawful responsibility or regulatory authority. It will also add two more strands to the tangled web of activity in the antitrust field and further compound the confusion by reaching opposite results for the FPC and the SEC under comparable fact situations. These important questions should be settled by this Court. Further, the Court of Appeals should not be permitted to set aside a supported finding of the FPC in a way which conflicts with applicable decisions of this Court.

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[21] Gulf States' statement in full of the purpose for which the securities were to be issued under Item J of its application was: "The proceeds from the sale of the New Bonds will be used by the Company to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of the date of issuance. The Company estimates that on December 16, 1970, the date the securities are expected to be sold, there will be outstanding approximately $55,000,000 principal amount of commercial paper and short-term notes issued on various dates. The aforesaid commercial paper and short-term notes to banks constitute an issuance of securities previously authorized by the Commission (Docket No. 4-7509." (R., p. 5.)

CONCLUSION

For these reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1972

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 24,764
& 24,963

CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent
LOUISIANA POWER & LIGHT COMPANY,
Intervenor

No. 71-1041

CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent
GULF STATES UTILITIES COMPANY,
Intervenor

PETITIONS FOR REVIEW OF ORDERS OF SECURITIES AND EXCHANGE COMMISSION AND FEDERAL POWER COMMISSION

Decided October 12, 1971

Before BAZELON, *Chief Judge*, and FAHY, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

LEVENTHAL, *Circuit Judge:* The Cities of Lafayette and Plaquemine, Louisiana ("Cities") petition this court to review orders of the Federal Power Commission and the Securities and Exchange Commission which approved applications, presented to the Securities and Exchange Commission by Louisiana Power and Light Company ("LP&L"), and to the Federal Power Commission by Gulf States Utilities Company, proposing issuance of bonds, notes, and stock to finance capital requirements. The gist of petitioners' complaint is that the agencies failed to take proper account of their claims that the proceeds would be used for the Companies' unlawful conspiracy to suppress competition. We affirm as to the orders of the Securities & Exchange Commission, and remand as to the order of the Federal Power Commission.

I. BACKGROUND

A. *Pertinent Statutes*

The Public Utility Act of 1935, passed August 26, 1935, 49 Stat. 803, contains, in Title I, the Public Utility Holding Company Act, 15 U.S.C. §§ 79 et seq., which provides for regulation of public utility holding companies and is administered by the SEC. Its Title II enacted the Federal Power Act, Parts II and III, 16 U.S.C. §§ 824 et seq. with provisions, for regulation of electric utility companies engaged in interstate commerce, administered by the FPC.

Holding Company Act

Sections 6 and 7 of the Holding Company Act give the SEC jurisdiction over sales of securities by holding companies and their subsidiaries, subject to certain exceptions.

notably an exemption in § 6(b) for issues approved by state commissions.[1]

Section 6 forbids the sale of a security by a holding company or its subsidiary, unless the sale is in accordance with a declaration it has filed under § 7, and with an order of the SEC permitting such declaration to become effective.

Under § 7 the SEC may not permit a declaration to become effective unless it finds compliance with certain requirements. One of these requirements, set forth in § 7(c)(2), is satisfied if the Commission finds "(2) such security is to be issued or sold solely . . . (B) for the purpose of financing the business of the declarant as a public utility company. . . ." If the requirements of §§ 7(c) and (g)[2] are met, § 7(d) requires that the SEC "shall permit a declaration . . . to become effective unless it finds that — . . . (6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers."

Finally, § 7(f) provides that the Commission's order permitting a declaration to become effective "may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section [7]."

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[1] Section 6 is codified as 15 U.S.C. § 79f. Section 7 is codified as 15 U.S.C. § 79g. Section 6(b) provides that if a particular security issue of a subsidiary has been expressly authorized by the appropriate state utility commission, the SEC shall exempt the issue "subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers. . . ."

[2] § 7(g) prohibits a declaration from becoming effective if the Commission has been informed by a State commission having jurisdiction over a company's issuance of securities, or alteration of rights of security holders, that State laws applicable thereto have not been complied with.

Federal Power Act

Section 204 of the Federal Power Act, 16 U.S.C. § 824c, relates to the issuance of a security by a public utility, – defined by § 201 as a company transmitting electric energy in interstate commerce or selling electric energy at wholesale in interstate commerce. Section 204(a) provides that no such public utility shall issue any security except as authorized by FPC order. It continues:

> The Commission shall make such order only if it finds that such issue . . . (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes.

Subsection (b) of § 204 gives the Commission broad authorization to place conditions on the granting of an application, and specifically contemplates provisions "as to the particular purposes, uses, and extent to which . . . any security . . . or the proceeds thereof may be applied. . . ."[3]

Subsection (f) of § 204 establishes an exclusion as to a utility organized and operating in a state under the laws of which its security issues are regulated by a State commission.

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[3] "(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section."

B. *Petitioners' Antitrust Allegations*

Louisiana Power and Light is a wholly-owned subsidiary of Middle South Utilities, Inc., a holding company registered under the Holding Company Act. It is engaged, as is Gulf States and Central Louisiana Electric Company (CLECO) (the three companies together being sometimes referred to as "Companies"), in generating, transmitting and selling electricity at wholesale and retail in Louisiana. Gulf States also does this in Texas. The three Companies are interconnected, engage in sales and exchanges of electricity among themselves, and are members of the eleven "South Central Electric Companies" which engage in a seasonal exchange of energy with the Tennessee Valley Authority. The Companies are owners in Louisiana of major transmission facilities, handling voltages up to 500 KV.

Petitioners allege that these three Companies engaged in a conspiracy to suppress and defeat an interconnection and pooling agreement between the Cities, Dow Chemical Company and Louisiana Electric Cooperative, Inc. ("LEC"). LEC, a generation and transmission cooperative financed by the Rural Electrification Administration, is made up of twelve electric distribution cooperatives, all of which operate in Louisiana.

In September 1964, the REA undertook to make a $56.5 million loan to LEC for construction of a 200 MW generating station with 1611 miles of transmission lines through which the LEC could serve eight of its twelve member cooperatives. Prior to this time, the three Companies had been selling power to these cooperatives. According to petitioners, the Companies succeeded in delaying the actual use of the funds thus provided for more than five years, through a series of lawsuits filed by the Companies themselves and by the Companies' attorneys on behalf of other putative plaintiffs.

Petitioners allege that in August, 1968, the Cities, Dow and LEC executed an Interconnection and Pooling Agreement providing for the interconnection of their generating systems and a long term pooling and coordination arrangement, with a minimum term of ten years. The agreement, approved by the REA administrator on November 19, 1968, provided for a combined planning of load requirements for the Cities, the LEC members and Dow. It meant, according to petitioners, assurance of a market for all surplus capacity and secondary energy, as well as coordination, and substantial savings, in the construction of new generators, in sum, economies of scale, plus benefits in the form of back-up for each system and energy interchanges.

Petitioners state that by engaging in frivolous and repetitive litigation, and by mounting a public relations drive and lobbying effort against LEC, the three Companies were able to hold up disbursement of the loan money until January, 1969, when a new REA administrator was sworn into office. This prevented the members of the new pool from going ahead with their agreement. Furthermore, a rise in costs during the five-year delay raised a serious question whether the original loan would suffice to finance all of the LEC's generation and transmission needs. Therefore, the new Administrator advanced funds only for the LEC generating station, but not for transmission lines, and LEC was left to negotiate with the three companies for use of their transmission lines.

Petitioners contend that the conspiracy continued during these negotiations. They say that the Companies, while willing to supply transmission of power to some of the LEC members, refused to supply transmission services between pool members. They further say that the Companies demanded that LEC limit its power capacity to the

200 MW already planned, and that the Companies supply all further power needs of the twelve cooperatives, thus precluding further LEC expansion to serve its members' expanding load.

C. *Agency Proceedings*

1. *Securities and Exchange Commission*

Case No. 24,764: On September 16, 1970, LP&L filed with the SEC a declaration for authority to issue and sell $20 million of first mortgage bonds and $7 million in preferred stock. The stated purpose of this financing was to enable LP&L to repay short-term borrowings it had made as temporary financing for its 1970 construction program, and for other corporate purposes.

On October 9, 1970, counsel for the Cities submitted a letter to the Commission, setting forth the allegations outlined above. The Cities asked the Commission to order an investigation of these matters by its staff, to consult with the staff of the FPC, and to withhold action on the authorization pending the results of the investigation or at least a conference with the parties. The Cities contended in their letter that the funds, if approved, would be utilized for the construction of facilities that would assist LP&L and its associates in their unlawful objectives, and asked that such approval, if granted, be conditioned on cessation of these activities and the establishment of a program to remedy the damage already done. The Cities requested that the matter be set down for hearing unless LP&L's parent agreed to such a condition. The Cities also requested a conference with the Commission and the Companies.

On October 27, 1970, the Commission issued its order stating that the Cities had not filed a Notice of Appearance as a party pursuant to Rule 9(a) of its Rules of Practice,

or requested a hearing. The order further stated that "this controversy does not justify withholding of the requested order since it is not relevant to the consideration of the proposed transactions which in all respects satisfy the standards of Section 7."

Case No. 24,963: On November 2, 1970, LP&L filed with the SEC a declaration for authority to issue and sell up to $40 million of short-term notes, during the period through December, 1972. The stated purpose of these borrowings was to finance the construction of new facilities and improvements, and for other corporate purposes.

On November 30, 1970, petitioners filed with the SEC a formal "Protest and Intervention," which contained substantially the same allegations as the October 9 letter, and further requested that the Cities be made parties to the proceeding and that the SEC hold hearings.

On December 29, 1970, the SEC issued its Order permitting the declaration to become effective. The SEC found that the Cities did not directly attack the proposed use of proceeds or the terms and conditions of the proposed securities, but were simply maintaining "that authorization for the proposed financing enhances Louisiana's financial position to pursue the alleged violations of the antitrust laws." The SEC held that its authority under Section 7(d)(6) of the Act, to impose terms and conditions, related solely to the terms and conditions of the security to be issued, and "does not extend to the resolution of collateral and unrelated controversies in which a declarant may be engaged with other parties." The SEC concluded that the allegations in the Protest did not present issues relevant to Section 7 and therefore did not justify withholding the requested Order.

The SEC made findings in each proceeding "that it is appropriate in the public interest and in the interest of

investors and consumers" that the declaration be permitted to become effective. It permitted both declarations to become effective without a hearing, and the security sales authorized were promptly completed.

2. *Federal Power Commission*

Case No. 71-1041: On October 12, 1970, Gulf States filed an application with the FPC to sell $30 million of first mortgage bonds at competitive bidding. The application stated that the proceeds would be used to pay off part of Gulf States' commercial paper and short-term notes. On October 16, 1970, the FPC noticed the application and announced that protests or petitions to intervene should be filed on or before November 2, 1970.

On November 2, the Cities filed their protest and petition to intervene with the Commission. The protest set forth the allegations outlined above, claiming that Gulf States had violated the antitrust laws, the Federal Power Act, and the Holding Company Act. The Cities requested that the application be set down for hearing unless, as a condition to receiving approval for the sale of its securities, Gulf States would agree to purge itself of these alleged violations and remedy the damage already done.

Following an answer by Gulf States, the Commission, on December 3, 1970, entered an order denying a hearing and authorizing Gulf States to issue the proposed bonds. The Commission stated that the Cities' allegations were "irrelevant to a requested authorization of securities," and further found that:

> The proposed issuance and sale of Bonds, as hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance by Applicant or

service as a public utility and which will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purposes.[4]

The FPC refused the Cities' request for a hearing stating:

> The requested approval of the issuance of the Bonds allows the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [sic] the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them.

In the petition for rehearing, filed December 16, 1970, the Cities argued that the Commission could not have known the purpose for which the bond proceeds would be used, because Gulf States had stated only that they would be added to the Company's general funds, to be used as part of interim funds for construction. Furthermore, the Cities argued, it was unclear whether the Commission considered their antitrust allegations irrelevant to a Section 204 determination generally, or only because, in this particular case, a refunding rather than new funding was involved. The Cities again urged that the Commission condition its approval to assure that the bond proceeds "would not be used to the detriment of the Cities or in a manner inimical to the proposed pool." The Commission denied rehearing, stating that the Cities' grounds for rehearing presented no

[4] By amendment filed December 9, 1970, Gulf States advised the Commission of the terms it proposed to accept in the financing. The Commission approved these terms by an order filed the same day, and again stated that the proposed bonds were for a lawful purpose, and their issuance compatible with the public interest.

facts or legal principles warranting any change in its orders.

II. PROCEDURAL PROBLEMS

Before proceeding to the substantive issues involved in this case, we note that intervenors LP&L and Gulf States contend petitioners are not properly before this court. Neither the SEC nor the FPC suggest any procedural obstacle to the petitions.

We find no merit in intervenors' procedural contention. LP&L's initial contention[5] is essentially grounded in a claim of failure to exhaust administrative remedies. While the Cities may not have followed SEC procedures to the letter, they made plain their objections and the Commission ruled on the merits. We see no impediment to judicial review. *Joseph* v. *FCC,* 131 U.S.App.D.C. 207, 404 F.2d 207 (1968).

Intervenors contend that the Cities are not aggrieved by the actions of the SEC and FPC, and therefore may not seek judicial review of their orders, either under the review provisions of the particular agency statutes,[6] or under the general review provisions of the Administrative Procedure Act.[7]

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[5] LP&L argues that in case 24,764 Cities failed to file a notice of appearance or formally request a hearing, and this amounted to a failure to urge its objections before the Commission, which precludes judicial review under § 24(a) of the Holding Company Act, 15 U.S.C § 79x(a).

[6] Section 24(a) of the Holding Company Act, 15 U.S.C. § 79x(a) provides judicial review for any "person or party aggrieved by an order issued by the Commission under this title. . . ." Section 313(b) of the Federal Power Act, 16 U.S.C. § 825 1(b) provides judicial review for any "party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding. . . ."

[7] Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702, grants judicial review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

This contention must be rejected on the authority of *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970). The petitioners have alleged injury in fact resulting from the Commission's failure to consider their antitrust contentions relevant. The interest asserted by the petitioners arguably falls within the zone of interests to be protected by the statutes. There is a non-frivolous claim that the "public interest" requirements of these statutes requires consideration of antitrust conspiracy.[8] Even assuming petitioners' contentions should be rejected on the merits, they raised an arguable claim of right under the relevant statutes that establishes procedural standing..

III. VALIDITY OF THE ORDERS

The orders of the FPC and SEC are accompanied by conclusory findings that approval of the applications is in the "public interest." The issue is whether these orders are valid in view of the refusal of these agencies to order a hearing on the allegations of intervening parties of the anti-competitive purpose and consequence of each application and its approval by the Federal agency involved.

The regulatory library includes a host of decisions establishing that when an agency is called upon to determine whether a proposal or condition satisfies the "public interest," or another similar broad standard, the agency has the authority and typically the responsibility to consider a challenge based on the asserted anti-competitive purpose or consequence of the proposal.[9]

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[8] Northern Natural Gas Co. v. FPC, 130 U.S.App.D.C. 220, 319 F.2d 953 (1968); City of Pittsburgh v. FPC, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

[9] FMC v Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 242-246 (1968); Denver & Rio Grande Western R.Co. v. United

This generality is not necessarily conclusive. The same statutory phrase may have different meanings in different contexts, and the statutes, agencies and court decisions are not necessarily fungible. A particular statute may have such a setting that, on consideration of its legislative history, the nature of the agency, and breadth of responsibility involved, and other material factors, a court may come to the conclusion that though its public interest language is broad its meaning in context warrants a relatively restricted reading.[10]

However it is a fair consensus of the cases cited that the nation's profound and pervasive devotion to competition as a fundamental economic policy, and conviction that the public interest is disadvantaged when private enterprises are permitted to engage in anti-competitive agreements and restraints, is applicable at least presumptively even in the case of monopolies or quasi- monopolies characterized by various degrees of government control and protection, subject of course to offset or rebuttal on analysis by the cognizant agency.

With these general observations as a point of departure, we consider the orders and statutes before us.

States, 387 U.S. 485 (1967); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); California v. FPC, 369 U.S. 482, 484-85 (1962); United States v. Radio Corporation of America, 358 U.S. 334 (1959); McLean Trucking Co. v. United States, 321 U.S. 67 (1944); Marine Space Enclosures, Inc. v. FMC, 137 U.S.App.D.C. 9, 17 ff, 420 F.2d 577, 585 (1969); Municipal Elec. Ass'n of Mass. v. SEC, 134 U.S.App.D.C. 145, 413 F.2d 1052 (1969); Northern Natural Gas Co. v. FPC, 130 U.S.App.D.C. 220, 226, 399 F.2d 953, 959 (1968); City of Pittsburgh v. FPC, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

[10] Alabama Electric Cooperative, Inc. v. SEC, 122 U.S.App.D.C. 367, 353 F.2d 905 (1965), *cert. denied*, 383 U.S. 968 (1966); Alabama Electric Cooperative, Inc. v. SEC, 359 F.2d 434 (5th Cir. 1966).

Federal Power Commission Order

Since Gulf States is an electric utility company engaged in interstate commerce, subject to regulation under Title II of the Federal Power Act, its proposal to sell $30 million of first mortgage bonds required an application by the company, and approval by the FPC, under § 204 of the Federal Power Act. Section 204 of the Federal Power Act is almost identical with the pertinent provisions of § 20a of the Interstate Commerce Act, as amended, 49 U.S.C. § 20a, which was recently given an authoritative reading in *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485 (1967).

In *Denver & Rio Grande* the Court was concerned with an application of Railway Express Agency to sell shares equal to 20% of its outstanding stock to Greyhound Corporation. On a finding of urgent need the ICC authorized this issuance without a hearing, and deferred decision of contentions presented by objectors that the proposal was not in the "public interest" or for a "lawful object" because it would result in "control" of the applicant by the carrier purchasing the shares, with "anti-competitive" consequences.

The Court rejected the Government's contention "that § 20a was designed to accomplish only the limited objective of protecting stockholders and the public from fiscal manipulation. . . ."[11] The Court held that the ICC had erred in entering its approval while deferring consideration of the anti-competitive effects of the transaction, and remanded to the ICC for further proceedings. It set forth in unmistakable terms the authority and responsibility of the ICC to consider the "anti-competitive" issues. See 387 U.S. at 492:

[11] See 387 U.S. at 491-92.

> We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation. Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction. Both the ICC and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anticompetitive effects.

The FPC observes that in another passage the Court said that the ICC was not required to hold a hearing in every case. That language merits exposition. See 387 U.S. at 498:

> We conclude, therefore, that the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances under § 20a(2). This does not mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present. But it does mean that, when the ICC exercises its discretion to approve issuances without first considering important control and competition issues, the reviewing court must closely scrutinize its action in light of the ICC's statutory obligations to protect the public interest and to enforce the antitrust laws. Whether or not an abuse of discretion is present must ultimately depend upon the transaction approved, its possible consequences, and any justifications for the deferral.

In this passage the court plainly earmarked the ICC's authority to omit a hearing on anticompetitive issues or to defer consideration thereof in cases presenting special circumstances — as an authority that required agency "justification" and close scrutiny by the reviewing court to assure against any abuse of discretion or default in statutory obligation.

The action of the FPC in the order before us is plainly inconsistent with its duties as developed in *Denver & Rio Grande*. The FPC contends to us that § 204 does not require the FPC to consider antitrust allegations when authorizing the issuance of securities. We are cited to *Pacific Power & Light Co.*, 27 FPC 623 (1962), and urged to show deference to the interpretation given a statute by the agency charged with its administration.[12] In the *Pacific Power & Light* proceeding the FPC was concerned with an application to issue "first mortgage bonds and common stock to use a portion of the proceeds to build a transmission line from Oregon to California at a higher voltage than would be presently required." The FPC noted that it had not been given certificate jurisdiction and "concluded that Section 204 could not be used as a vehicle for 'comprehensive licensing-type regulation . . .' 27 FPC at 626. In the Commission's view, 'the plain purpose of Section 204 was 'to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities.' *Ibid.*"

We are not called upon to review the FPC's decision in *Pacific Power & Light*, or to take account of the points raised in Commissioner Morgan's vigorous dissent. The FPC's 1962 ruling came prior to the Supreme Court's 1967 decision in *Denver & Rio Grande*, a point that merits

[12] Udall v. Tallman, 380 U.S. 1 (1965).

particular emphasis since the FPC itself stressed that § 204(a) was "copied almost verbatim from Section 20a of the Interstate Commerce Act" (27 F.P.C. at 627), and relied on the proposition that the purpose of § 20a was to ensure a sound railroad credit structure.[13] But of course the Court's *Denver and Rio Grande* opinion establishes that while sound financial credit was the dominant objective of § 20a of the Interstate Commerce Act, the breadth of the "public interest" criterion extends to the anticompetitive issues. Thus the FPC's own 1962 reasoning that its law tracks the ICC's statute undercuts the survival of its broad conclusion that § 204(a) is limited to financial matters.[14]

The same may be said for the FPC's conclusion that its authority is necessarily limited since an interstate electric utility may issue short-term notes without FPC authority pursuant to § 204(e) of the Federal Power Act,[15] and could launch its construction with those funds. The same might have been said as to the ICC, which has even less authority over short-term notes than the FPC.[16] The short answer is that a utility would be improvident indeed if it relied on its short-term authority to obviate agency overview on application for approval of the long term securities.

The *Pacific Power & Light* ruling stated that the FPC lacks authority to certificate a utility's operation or expan-

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[13] Citing Sharfman, Interstate Commerce Commission, 190 (N.Y. 1931).

[14] The FPC noted that the Senate Committee "stressed" that control over capitalization is an essential means of safeguarding the public against unsound financial practices, see S. Rep. No. 621, 74th Cong., 1st Sess. (1935) p. 50. But this Senate Report in no way negatives Justice Brennan's comment in *Denver & Rio Grande* that this dominant concern is not exclusive.

[15] Under § 204(e), 16 U.S.C. § 824c(e), the FPC is not given authority as to notes of less than a year's maturity aggregating less than 5% of the company's outstanding securities.

[16] Under § 20a(9) of the Interstate Commerce Act, 49 U.S.C. § 20a(9), the authority of the ICC does not extend to notes of two years or less duration not exceeding 5% of outstanding securities.

sion. This has some weight, but not enough. It would have more if the FPC were in the same position as the SEC, of having no regulatory authority over operations of the utility. But the FPC does have authority over interstate electric utilities, and that authority is by no means insubstantial. As was rightly said in its most recently available annual report, the FPC "exercises national responsibility for the regulation of the interstate electric power industry. . . ."[17]

Apart from regulating interstate electric utilities in regard to their issuance of securities, the FPC is mandated under the Federal Power Act to regulate their charges for the interstate transmission of electric energy (§ 206), and their mergers or consolidations (§ 203).

Significantly the FPC has been given authority and responsibility by § 202 of the Act, 16 U.S.C. § 824a, in regard to interconnection and coordination of facilities.

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of national resources," § 202(a) directs the FPC "to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy" and pronounced it the "duty of the Commission to promote and encourage such interconnection and coordination within each district and between such districts."

Section 202(b) gives mandatory authority to the FPC, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, to order an interstate electric utility "to establish physical interconnection of its transmission facilities with the facili-

[17] 1970 Annual Report, FPC, p. 24.

ties of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons." This authority exists if the FPC makes a finding that its exercise is in the public interest, subject only to the proviso that the interconnection not require the regulated utility to enlarge its generating facilities or impair its existing services.

In view of the FPC's broad public interest charter to enhance optimum interconnection and interchange of electric energy, not to mention its array of other activities in furtherance of electric energy capability,[18] the circumstance that its jurisdiction has not been extended to certificating responsibility is no reason for limiting it under § 204 to a tunnel vision of the public interest.

At oral argument the Commission's General Counsel put it that the FPC is interested in safeguarding costs, rates and reliability, but it wants to stay out of the fight between investor-owned utilities on the one hand and cooperatives and municipalities on the other. Whether or not this is tactical wisdom, it may not be achieved at the expense of abdicating responsibility. And we see no reason why the responsibility of considering the public interest requires any jeopardy of the kind of objectivity that is contemplated for an independent regulatory commission.

The Commission is expected to make determinations as to the public interest in matters where there is such underlying conflict. Its docket contains a number of complaints

[18] The 1970 Annual Report discusses, inter alia, its Electric Power Reliability Policy; adoption in pursuance thereof, of "a system of comprehensive reporting by all segments of the electric power industry (private, public, cooperative and Federal) of information on operating data and advance planning by power pools, coordinating groups, and individual utilities and on studies to support such plans"; its 1970 National Power Survey; and the work of its Task Force on Environment.

appropriately referred to as supple and flexible.[28] The doctrine of primary jurisdiction "has become one of the key judicial switches" in furtherance of "coordination between judicial machinery and [administrative] agencies" in matters of mutual concern.[29] Switches operate both ways, and, depending on the nature of the issue, an agency may wait for a court as well as the reverse.

We have been at pains to set forth the latitude available to the agency in approach and procedure to obviate any concern that this court seeks to interfere with its exercise of discretion. What the court does require is that the agency take a "hard look" at problem areas.[30]

Securities and Exchange Commission

Section 7(d)(6) of the Holding Company Act is not written in the same terms as § 204 of the Federal Power Act. The SEC, in holding petitioners' antitrust allegations irrelevant to its determination, and refusing to set the matter down for hearing, stated:[31]

> The phrase "terms and conditions" as here used relates solely to the terms and conditions of the security to be issued, and therefore, the phrase "detrimental to the public interest" refers to such terms and conditions and not to extraneous matters. Section 7(f) provides that "any order permitting a declaration to become effective may contain such terms and conditions as the

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[28] J.M. Huber Corp. v. Denman, 367 F.2d 104, 111 (5th Cir. 1966).

[29] Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68-69 (1970); Brawner Building, Inc. v. Shehyn, —— U.S.App.D.C. ——, 442 F.2d 847 (1971). *Compare* United States v. Morgan, 307 U.S. 183, 191 (1939).

[30] Greater Boston Television Corp. v. FCC, —— U.S.App.D.C. ——, —— F.2d —— (slip opinion at p. 18) (Nov. 13, 1970), *cert. denied*, 403 U.S. 923 (June 14, 1971); WAIT Radio v. FCC, 135 U.S.App.D.C. 317, 418 F.2d 1153 (1969).

[31] JA 160, Holding Company Act Release No. 16955.

Commission finds necessary to assure compliance with the conditions specified in this section." Authorization to impose terms and conditions under Section 7(f) does not extend to the resolution of collateral and unrelated controversies in which a declarant may be engaged with other parties. See *Alabama Power Co.*, (Holding Company Act Release No. 15252, June 1, 1965), *affirmed*, *Alabama Electric Cooperative, Inc.* v. *SEC*, 353 F.2d 905 (1965), *cert. denied*, 383 U.S. 968.

We turn first to the precedent cited by the SEC. In *Alabama Electric Cooperative* v. *SEC*, 122 U.S.App.D.C. 367, 353 F.2d 905 (1965), Alabama Power, seeking to issue $14 million of common stock, claimed an exemption from SEC supervision under § 6(b) of the Holding Company Act, on the ground that the issue was subject to regulation by a state commission. The Cooperative objected that the holding company intended to use the proceeds of this sale so as to duplicate its lines and facilities, and asked the SEC to prevent such use, through its power to impose conditions on an exemption "in the public interest or for the protection of investors or consumers." When the SEC refused, the Cooperative argued it had erred in refusing to consider the claim of anti-competitive effect. We affirmed the Commission, saying (122 U.S.App.D.C. at 369, 353 F.2d at 907):

> The purpose of the Public Utility Holding Company Act . . . was to supplement state regulation—not to supplant it. Nowhere in the Act is there a provision granting to the SEC the sort of regulatory power attributed to it by the petitioner. Indeed, the congressional choice of that Commission to administer the Act is, in itself, the strongest sort of proof that the general purpose of the Act was to regulate the issuance of securities which could not be reached by state commissions.

In *Municipal Electric Ass'n of Massachusetts* v. *SEC*, 134 U.S.App.D.C. 145, 413 F.2d 1052 (1969), however, this court required the SEC to consider anti-competitive effects.

comply with the requirement we see in *Denver & Rio Grande,* that the agency's reason for denying or deferring hearing of anticompetitive issues be clear on the record, meaningful in findings or discussion.

Accordingly we deem it necessary to remand the order under review. To avoid misunderstanding, we think it appropriate to say expressly that an agency is not required to hold hearings in matters where the ultimate decision will not be enhanced or assisted by the receipt of evidence.[23] And as to interventions raising anti-competitive issues we see no objection in law to a disposition without hearing that is accompanied by an explanation, supported in the record, that the intervenor's contentions are too insubstantial or barren to indicate the existence of substantial anticompetitive issues, or to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application.[24]

We do not undertake to determine now what is involved in the requirement of reasonable nexus, which we think is fairly implied in the jurisprudence. Development of this requirement must await consideration in the first instance by the agency involved, and an analysis of the factual context.

We are aware, too, of the pertinence of the comment of FPC's counsel, that security issues to provide funds for a utility's construction must be decided in a time frame much more limited than that often contemplated for anti-

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[23] Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n. 356 U.S. 282, 287 (1958); Citizens for Allegan County Inc. v. FPC, 134 U.S.App.D.C. 229, 414 F.2d 1125 (1969).

[24] In Municipal Elec. Ass'n of Mass. v. SEC, 134 U.S.App.D.C. 145, 152, 413 F.2d 1052, 1059 (1969), the court noted that the control challenged by the cities "is tied in significant manner to the acquisition of the stock" for which approval was sought.

trust litigation. But the doctrine of public interest consideration does not contemplate that an agency will be engaged in a determination of antitrust issues as such.[25]

In the context of a particular matter, it may become evident that the agency may approve forthwith a large portion of the application, and the use of the funds contemplated thereby, while reserving decision on the difficult issue. Indeed even an entire application may be approved if the agency stands ready to proceed with hearing and consideration of the anticompetitive issues, and to take the problems into account in the disposition of another application projected for presentation to the agency within a reasonable time.[26]

So far as antitrust issues are concerned the agency has the opportunity to obtain the comments of the Department of Justice.[27] It may even, indeed, defer its disposition pending determination of relevant court litigation where that will aid in the determination of the "public interest" issue. This would be in effect a reverse application of the doctrine of primary jurisdiction, a doctrine that has been

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[25] Northern Natural Gas Co. v. FPC, *supra*, note 9, 130 U.S.App. D.C. at 229-30, F.2d at 962-63.

[26] Even in courts the doctrine of mootness does not apply to questions of a recurring nature. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911); Friend v. United States, 128 U.S.App. D.C. 323, 388 F.2d 579 (1967).

[27] Northern Natural Gas Co. v. FPC, *supra*, 130 U.S.App.D.C. at 227, 399 F.2d at 960. Intervenor observes that § 314(a) of the Federal Power Act does not set for a duty in the FPC to report antitrust violations to the Attorney General such as appeared in § 20(a) of the Natural Gas Act of 1938. If this is more than an accident of drafting style, perhaps marking the change between 1935 and 1938, it does not limit the authority of the agency either to refer matters to the Attorney General or to entertain his presentations.

by public utilities and by cooperatives against private companies, both for physical interconnection and for termination of charges attacked as discriminatory or otherwise unlawful.[19] It is illuminating that only recently the Supreme Court sustained an FPC interconnection order that rejected the claim of a private utility to make an interconnection with a municipally-owned utility on terms more onerous than those required of other investor-owned utilities.[20]

Replacement of Short-Term Notes

The FPC's counsel vigorously urged an alternative contention, that the Cities' intervention did not require a hearing since their allegations concerning Gulf States' operations could have no meaningful relation to an application that only sought to replace short-term notes with long-term bonds.

This contention is not without appeal, and also not without problems. First, the order giving Gulf States authority to issue $30 million bonds to replace short term notes apparently operated to give Gulf States authority to increase its overall debt, since it would have had authority forthwith to issue an additional $30 million in short-term notes.[21] It is not clear whether FPC counsel would have urged

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[19] Annual Report for 1970, Table 10, p. 26.

[20] Gainesville Utilities Department et al v. Florida Power Corp., 402 U.S. 515 (1971). The FPC rejected the claim of Florida Power Co. that the city system pay not only the capital cost of the interconnection but also an annual payment for the backup service. It noted among other matters that Florida Power had not included a comparable charge in any of the contracts for interconnection voluntarily negotiated with members of the Florida Operating Committee, an informal group coordinating the technical operations of five Florida utilities.

[21] Its previously granted authority to issue $80 million short term notes would not have been terminated, though the duration of the notes authorized would have been reduced by the lapse of time.

the same contention if the outstanding short-term notes had been of one year's duration and had been issued by Gulf States, pursuant to § 204(e) of the Act, on its own authority and without an FPC order. A contention this broadly put would raise most serious questions.

The ultimate reason, however, for rejecting this contention of FPC counsel is that the cryptic statement of the FPC does not permit us to conclude with reasonable confidence that this was the position taken by the FPC. And we cannot permit arguments of counsel to take the place of agency findings.[22]

Our problem is not a merely technical one. The point here urged by counsel has significance only on the assumption that at another time the FPC would consider the anti-competitive issues as material. But that assumption means a modification or restriction of the FPC's 1962 ruling in *Pacific Power & Light, supra.* We have no guidance from the FPC that it accepted a limitation of that ruling. Indeed we have been asked to affirm its order on the reasoning of that 1962 ruling. Moreover when the Cities, in their petition for rehearing, expressly requested the FPC to advise whether the reason for denial of a hearing was the nature of the application as seeking approval for long-term bonds on a refunding of short-term notes, the FPC declined to say this.

We do not consider what ruling we would make on the basis of such a position if thought through and embodied in FPC policy and findings. It suffices for present purposes to say that the FPC's terse and cryptic statement did not

[22] Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962); Public Serv. Comm. of the State of New York v. FCC, — U.S.App.D.C. —, 436 F.2d 904 (1970); WAIT Radio v. FCC, 135 U.S.App.D.C. 317, 418 F.2d 1153 (1969); Braniff Airways, Inc. v. CAB, 126 U.S.App.D.C. 399, 379 F.2d 453 (1967).

That case involved an application by several New England electric utilities, under § 10 of the Holding Company Act, 15 U.S.C. § 79j, to approve their acquiring the stock of two nuclear-power electric generating companies. The Municipals sought a hearing on their charge that any approval of the acquisition, to the exclusion of the Municipals' opportunity to obtain power directly from the nuclear-power plants, would not be in the public or consumer interest, since it would deprive the Municipals of access to a course of cheap power and thus harm them competitively. The SEC denied the request for a hearing, holding that the Municipals had presented no issue of fact relevant to the proceedings. We reversed, and remanded for a hearing before the SEC concerning the imposition of appropriate conditions on the transaction.

Petitioners claim that both our action and opinion in *Municipal* establish the necessity of considering antitrust allegations before granting approvals to stock issues under §§ 6 and 7. However, the *Municipal* opinion expressly asserts that a line, albeit a "fine line," is to be drawn between SEC's approval of an acquisition of stock by a utility, and a sale of securities by a utility. Acquisitions are governed by §§ 9 and 10 of the Holding Company Act. Our *Municipal* opinion pointed out that § 10, unlike § 7, expressly prohibits approval of a transaction if the Commission finds that it will tend toward interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers.

The *Alabama Cooperative* case is not to be read as limiting SEC's consideration under § 7(d)(6) solely to reviewing the financial terms of the security to be issued. The force of that 1965 opinion is weakened, apart from the 1967 opinion in *Denver & Rio Grande*, by its erroneous assump-

tion of the narrow reading to be given to § 10, an assumption undercut by our 1969 opinion in *Municipal*. Moreover, *Alabama Cooperative* did not involve an SEC approval in the course of exercising its jurisdiction under §§ 6 and 7, but the question whether it could impose terms to qualify the exemption provided by § 6(d) for security issues approved by a state commission. In *Municipal Elec. Ass'n of Mass* v. *SEC*, 136 U.S.App.D.C. 175, 419 F.2d 757 (1969), we specifically reserved the issue of whether antitrust considerations are included in the public interest referred to in approvals of §§ 6 and 7.

We think proper resolution of the problem now before us is provided by affirmance of the SEC's order, but with modification in part of our discussion in *Alabama Cooperative*. Where an agency has some regulatory jurisdiction over operations, it must consider whether there is a reasonable nexus between the matters subject to its surveillance and those under attack on anti-competitive grounds. But the general doctrine requiring an agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the FPC which, as we have already noted, has regulatory jurisdiction over operations in view of its authority, *inter alia*, to direct utilities to interconnect on reasonable terms, or to prohibit a utility from discriminating in rates and facilities against its municipal customers.

In *Municipals* the utility's acquisition of stock was subject to SEC jurisdiction. And the court held that the exercise of the authority to approve acquisitions requires

consideration of antitrust matters, particularly in view of the statutory purpose to avoid undue concentration of control in public utility holding companies. This is a more static issue than direct surveillance of operations. It is rather a review of proposed structure to ascertain whether it embraces a substantial possibility of undue concentration of control. Of course a decision on structure requires "economic forecasting" concerning operations, in such matters as *e.g.*, profitability, consequence of independence of management. *SEC* v. *New England Elec. System*, 390 U.S. 207, 211, *et seq.* (1968). Yet although the matters are interrelated, the SEC's jurisdiction relates to structure rather than directly to operations.

To avoid misunderstanding, we are not here accepting the contention of SEC counsel that the distinction lies between application under § 10 for acquisition, which requires consideration of antitrust issues, and applications under § 6 for approval of security issues, which do not. As to applications under § 6 the question left open by second *Municipals* is still open. So far as this opinion is concerned the court will be free to determine, if the circumstances warrant, that the application under § 6 requires consideration of antitrust issues because the purpose of the application is significantly related to the structural position of the applicant in the industry — perhaps by a proposal for operating affiliation as well as one for capital affiliation — which presents the kind of issue, of undue concentration of control, that lies within the regulatory jurisdiction of SEC upon consideration of an application under § 10.

There may also be circumstances where a particular proposed operating use of funds will, it is claimed, be linked significantly to operations within the SEC surveillance contemplated by Congress. Suppose it were objected that the utility planned a covert use of a significant part of the

proceeds of a security issue to establish a political slush fund prohibited by § 12(h) of the Holding Company Act. We think the SEC would be under a duty to give consideration to the claim, for the matter challenged is within the reasonable contemplation of Congress as one in which the SEC has a sphere of interest, and should explore further when the issue is brought to its attention.

Addressing ourselves broadly, however, to the question of sale of securities, and taking into account the regulatory volumes involved[32] and the lack of any SEC authority to regulate operations of utilities, we think an objecting intervenor cannot require SEC consideration of the applicant's operating activities from the point of view of undue restraints on competitors or potential competitors. We state this doctrine in terms of broad application rather than in categorical terms, for we leave open the resolution appropriate if in a particular case the operations assailed are of such a nature as to be equivalent, in significance and consequence, to structural affiliation, or if the purpose of the utility's sale of securities is otherwise shown to have a reasonable nexus to matters within the SEC's jurisdiction under other provisions. Within the broad reach of the doctrine we deem applicable we do not think petitioners have made a showing of reversible error.

In Nos. 24,764 and 24,963, the orders of the SEC are affirmed. In No. 71-1041, the cause is remanded to the FPC for further proceedings not inconsistent with this opinion.

So ordered.

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[32] In fiscal 1970, 15 active registered bidding companies and their subsidiaries sold 59 issues, pursuant to SEC authorization, and raised new capital in the amount of $1,684,000,000. SEC 36th Ann. Report (for 1970) p. 164.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED Oct. 12, 1971

/s/ Nathan J. Paulson

Clerk

No. 71-1041

CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA,

Petitioners

v.

FEDERAL POWER COMMISSION,

Respondent

GULF STATES UTILITIES COMPANY,

Intervenor

Petition for Review of Order of the Federal Power Commission

Before: BAZELON, *Chief Judge; and* FAHY, *Senior Circuit Judge, and* LEVENTHAL, *Circuit Judge.*

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel. Respondent thereafter filed a supplemental memorandum. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that this case is hereby remanded to the Federal Power Commission for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court:

/s/ NATHAN J. PAULSON
NATHAN J. PAULSON
Clerk

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED Dec. 15, 1971

/s/ Nathan J. Paulson
Clerk

No. 71-1041

CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent

GULF STATES UTILITIES COMPANY,
Intervenor

Before: BAZELON, *Chief Judge;* FAHY, *Senior Circuit Judge and* LEVENTHAL, *Circuit Judge.*

ORDER

On consideration of intervenor's petition for rehearing on petition to review an order of the Federal Power Commission, it is

ORDERED by the Court that intervenor's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ NATHAN J. PAULSON
NATHAN J. PAULSON
Clerk

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:
John N. Nassikas, *Chairman;* Lawrence J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert E. Brooke, Jr.

GULF STATES UTILITIES COMPANY,
Docket No. E-7567

ORDER AUTHORIZING ISSUANCE OF FIRST MORTGAGE BONDS, GRANTING INTERVENTION AND DENYING HEARING

(Issued December 3, 1970)

Gulf States Utilities Company (Applicant), a corporation organized under the laws of the State of Texas and doing business in the States of Texas and Louisiana, filed an application on October 12, 1970, seeking an order pursuant to Section 204 of the Federal Power Act authorizing it to issue and sell at competitive bidding, $30,000,000 aggregate principal amount of First Mortgage Bonds, due 2000.

The Applicant proposes to issue the Bonds under their Indenture of Mortgage to Manufacturers Hanover Trust Company, dated September 1, 1926, as supplemented and proposed to be further supplemented by a Twenty-ninth Supplemental Indenture dated as of the date of the new Bonds.

Applicant originally proposed to publish bids for purchase of the Bonds on November 24, 1970, and to accept a bid on December 9, 1970. The proposed publication of bids can be delayed for one-week and still allow the Applicant to meet the date set for bid acceptance.

Each bid must be presented by a single bidder or by a group of bidders to the Company at Manufacturers Hanover Trust Company, the Federal Room, Fourth Floor, 40 Wall Street, New York, New York 10015, before 11:00 A.M. New York Time, on December 9, 1970.

Each bid shall specify, among other things, (1) the interest rate of the Bonds, which shall be a multiple of ⅛%; (2) the price (expressed as a percentage of the principle amount), exclusive of accrued interest, to be paid to the Company for the Bonds, which shall not be less than 99% and not more than 102½% of the principle amount of the Bonds, and that accrued interest on the Bonds from the first day of the month in which the Bonds are issued to the date of payment therefor and delivery thereof will be paid to the Company by the Purchaser or Purchasers.

The proceeds to be realized from the sale and issuance of the proposed Bonds will be used by the Company to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of the date of issuance. The Company estimates that on December 16, 1970, the date the securities are expected to be sold, there will be outstanding approximately $55 million principal amount of commercial paper and short-term notes issued on various dates. The short-term indebtedness of the Company was authorized by the Commission in Docket No. E-7509 and the proceeds from the notes were expended in connection with the Company's construction program and for other corporate purposes. The cost of new construction is expected to total $110 million in 1970 and $93 million in 1971.

Written notice of the application has been given to the Texas Railroad Commission, the Louisiana Public Service Commission, and to the Governor of each of those States.

Notice has also been given by publication in the Federal Register on October 27, 1970 (35 F.R. 16649), stating that any person desiring to be heard or to make any protest with reference to the application should on or before November 2, 1970, file a petition or protest with the Federal Power Commission, Washington, D. C. 20426.

On November 2, 1970, the Cities of Lafayette and Plaquemine, Louisiana, filed a protest and petition to intervene in the proceeding requesting that the Commission withhold the order authorizing the issuance of the proposed Bonds and that the proceeding be set for hearing. Intervenors allege that activities of the applicant violate Federal anti-trust laws, Section 10(h) of the Federal Power Act, and the Public Utility Holding Company Act of 1935. All violations arising from Applicant's activities allegedly prevented construction of generating facilities by certain utilities in Louisiana and power pooling arrangements in which the cities are to participate.

On November 12, 1970, the Applicant answered the protest and petition to intervene denying violations of the anti-trust laws, the Federal Power Act, or the Public Utility Holding Company Act of 1935, and contending, among other things that the Cities lack standing to intervene, in that they have not alleged any interest which may be affected, or as to which they will be bound by Commission authorization of the proposed Bond application.

The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of

securities. There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them.

The Commission finds:

(1) The Applicant, a corporation, is a public utility within the meaning of Section 204 of the Federal Power Act subject to the jurisdiction of the Commission as heretofore determined and set forth in the Commission's order issued *November 27, 1957, In the Matter of Gulf States Utilities Company,* Docket No. E-6785 (18 FPC 701).

(2) The proposed issuance and sale of Bonds, as described above will constitute an issuance of securities within the purview of Section 204 of the Act.

(3) Applicant is not organized and operating in a State under the laws of which the security issue here involved is regulated by a State Commission within the meaning of Section 204(f) of the Act; and the proposed issuance of securities is, therefore, not exempt by virtue of that Section from the requirement of Section 204 of the Act.

(4) The proposed issuance and sale of Bonds, as hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance by Applicant or service as a public utility and which will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purposes.

(5) Intervention by the above-mentioned petitioners may be in the public interest for purposes of Commission consideration of their petition.

(6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission.

(7) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, do not raise any issue which requires a hearing.

The Commission orders:

(A) The above-mentioned petitioners are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission. *Provided, however,* That the admission of the afore-mentioned petitioner's shall not be construed as recognition by the Commission that the petitioners might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The above-mentioned petitioners request for hearing is denied.

(C) The proposed issuance and sale of Bonds upon the terms and conditions and for the purposes specified in the application as described above, is hereby authorized, subject to the provisions of this order.

(D) The proposed issuance and sale of Bonds at competitive bidding shall not be consummated until:

(i) Applicant shall have amended its application pursuant to the requirements of Section 34.2(g) of the Commission's Regulations under the Federal Power Act relating to compliance with competitive bidding requirements, and Section 34.2(h) of those Regulations relating to affiliation, and shall have either filed such amendments or shall have mailed them and advised

the Commission by telephone and telegraph, as contemplated in Section 34.9 of the Regulations;

(ii) The Commission, by a further order, shall have approved the price to be received by Applicant for the proposed issuance of Bonds and the interest rate thereof.

(E) This authorization shall expire unless the transactions hereby authorized are consummated within 90 days from the date of issuance of this order.

(F) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of cost, or any other matter whatsoever now pending or which may come before this Commission.

(G) Nothing in this order shall be construed to imply any guarantee or obligation on the part of the United States with respect to any securities to which this order relates.

By the Commission.

(SEAL)

Gordon M. Grant,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Carl E. Bagge, and Albert B. Brooke, Jr.

Gulf States Utilities Company Docket No. E-7567

SUPPLEMENTAL ORDER AUTHORIZING ISSUANCE OF FIRST MORTGAGE BONDS

(Issued December 9, 1970)

By order issued December 3, 1970, in the above-entitled matter, the Commission authorized Gulf States Utility Company (Applicant), to issue and sell at competitive bidding $30,000,000 principal amount of First Mortgage Bonds subject, among others, to the provisions set forth in paragraph (D) of that order, as follows:

(D) The proposed issuance and sale of Bonds at competitive bidding shall not be consummated until:

(i) Applicant shall have amended its application pursuant to the requirements of Section 34.2(g) of the Commission's Regulations under the Federal Power Act relating to compliance with competitive bidding requirements, and Section 34.2(h) of those Regulations relating to affiliation, and shall have either filed such amendments or shall have mailed them and advised the Commission by telephone and telegraph, as contemplated in Section 34.9 of the Regulations;

(ii) The Commission, by a further order, shall have approved the price to be received by Applicant for the proposed issuance of Bonds and the interest rate thereof.

Applicant, on December 9, 1970, filed an amendment, pursuant to the requirements of the afore-mentioned Commission order, in which it states, among other things that it proposes to accept, as representing the lowest cost of money to be paid by the Applicant to the underwriters, the bid of The First Boston Corporation, Salomon Brothers and Eastman Dillon, Union Securities & Co. Underwriters to purchase the proposed $30,000,000 issue of First Mortgage Bonds carrying a coupon rate of 7⅞% at a price to the Company of $99.42% of principal amount. Based upon an initial public offering price of 100.286% of principal amount, the yield will be 7.85% and the Company's cost of money will be 7.9259%.

The Commission finds:

(1) Applicant has satisfactorily complied with the requirements contained in paragraph (D) of the Commission's order issued December 3, 1970, in the above-entitled Docket; and the competitive bid it proposes to accept for the Bonds and the interest rate thereof are reasonable.

(2) The proposed issuance and sale of Bonds as hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance of service by Applicant as a public utility and which will not impair its ability to perform that service, and is reasonably appropriate for such purposes.

The Commission orders:

(A) The price to be received by Applicant for the proposed Bonds and the interest rate thereof, are approved as reasonable.

(B) The proposed issuance and sale of Bonds referred to above, upon the terms and conditions, and for the purposes specified in the application, as supplemented by the amendment referred to above, are hereby authorized, subject only to the provisions of paragraph (E), (F) and (G) and of the Commission's order issued December 3, 1970, in the above docket.

By the Commission.

(S E A L)

Gordon M. Grant,
Secretary.

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:
John N. Nassikas, *Chairman;* Lawrence J. O'Connor, Jr., John A. Carver, Jr., and Albert B. Brooker, Jr.

GULF STATES UTILITIES COMPANY
Docket No. E-7567

ORDER DENYING APPLICATION FOR HEARING

(Issued January 13, 1971)

By order issued December 3, 1970, the Commission authorized Gulf States Utilities Company (Applicant) to issue $30,000,000 principal amount of First Mortgage Bonds, due 2000, subject, however, to further Commission approval of the price of the Bonds to be paid to the Applicant and the interest rate of the Bonds. The Commission also granted leave to intervene to the Cities of Lafayette and Plaquemine, Louisiana, based upon their protest and petition to intervene filed November 2, 1970; Hearing in the proceeding was denied.

By supplemental order issued December 9, 1970, the Commission approved the price of the Bonds and the interest rate thereof, thereby authorizing the immediate issuance of the Bonds.

Intervenors on December 16, 1970, filed in this proceeding an application for rehearing of the Commission's orders of December 3, 1970 and December 9, 1970, seeking withdrawal of those orders, setting the case for full hearing, and directing Commission Staff to pursue an investigation of Applicant's activities. In their application for rehearing, Intervenors incorporate all grounds raised in their original

petition to intervene as previously considered by the Commission. In addition, Intervenors present the further argument that the Applicant's described use of the funds authorized in Docket No. E-7567 and Docket No. E-7509, as set forth in the applications, are not sufficient to support the Commission's findings that the issuance of Bonds is for a "lawful object . . . compatible with the proper performance by (Gulf States of) service as a public utility. . ."

The Commission finds:

The grounds for rehearing set forth in the application filed on December 16, 1970, by the Cities of Lafayette and Plaquemine, Louisiana in Docket No. E-7567 present no facts or legal principles which would warrant any change in or modification of the aforementioned Commission orders issued December 3, 1970 and December 9, 1970.

The Commission orders:

The application for rehearing filed by the Cities of Lafayette and Plaquemine, Louisiana on December 16, 1970, in Docket No. E-7567 is denied.

By the Commission.

(SEAL)

Gordon M. Grant,
Secretary.

APPENDIX G

FEDERAL POWER ACT
TITLE 16 USCA

SUBCHAPTER II.—REGULATIONS OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter; definitions

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in sections 824-825r of this title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in said sections, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate

commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of sections 824-824h of this title, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in sections 824-824h of this title, means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in sections 824-825r of this title means any person who owns or operates facilities subject to the jurisdiction of the Commission under sections 824-824h of this title.

(f) No provision in sections 824-824h of this title shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847.

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries—Regional districts; establishment; notice to State commissions

(a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper

utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State Commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

Sale or exchange of energy; establishing physical connections

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel

such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them. (§202)

§ 824b. Disposition of property; consolidations; purchase of securities

(a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supple-

mental to any order made under this section as it may find necessary or appropriate. June 10, 1920, c. 285, § 203, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 849.

§ 824c. Issuance of securities; assumption of liabilities; filing duplicate reports with Securities and Exchange Commission

(a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after Aug. 26, 1935.

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof

may be applied, subject always to the requirements of subsection (a) of this section.

(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under section 77g and sections 78l and 78m of Title 15. June 10, 1920, c. 285, § 204, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 850.

§ 824d. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the

Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of

such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or

collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852.

§ 825d. Officials dealing in securities; declaring dividends out of capital account; interlocking directorates

(a) It shall be unlawful for any officer or director of any public utility to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale by such public utility of any security issued or to be issued by such public utility, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such public utility from any funds properly included in capital account.

(b) After six months from August 26, 1935, it shall be unlawful for any person to hold the position of officer or director of more than one public utility or to hold the position of officer or director of a public utility and the

position of officer or director of any bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility, or officer or director of any company supplying electrical equipment to such public utility, unless the holding of such positions shall have been authorized by order of the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby. The Commission shall not grant any such authorization in respect of such positions held on August 26, 1935, unless application for such authorization is filed with the Commission within sixty days after that date, June 10, 1920, c. 285, § 305, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 856.

§ 825e. Complaints

Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper. June 10, 1920, c. 285, § 306, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 856.

§ 825f. Investigations by Commission; attendance of witnesses; depositions; immunity of witnesses

(a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject. (§307)

§ 825l. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such

person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satis-

faction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32 (a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 16, 72 Stat. 947.

CLAYTON ACT

TITLE 15 USCA

§21. Enforcement provisions—Commissions and Boards authorized to enforce compliance

(a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communications or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the viola-

tion of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or

Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section. (§11)